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NO. 386

In the Supreme Court of the United States

OCTOBER TERM, 1940

CONTINENTAL OIL COMPANY, a Corporation,
Petitioner and Appellant Below,

VERSUS

H. C. JONES, Collector of Internal Revenue,
Respondent and Appellee Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

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Dated August 27, 1940.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE

THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Continental Oil Company, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Tenth Circuit affirming the judgment of the District Court of the United States for the Western District of Oklahoma in favor of respondent and against this petitioner.

STATEMENT

This is an action by petitioner, Continental Oil Company, a Delaware corporation, against H. C. Jones, Collector of Internal Revenue, to recover excise taxes in the sum of $699,131.32, plus interest, assessed and paid under

Sections 601(c) (1) and 617, Title IV of the Revenue Act of 1932, 47 Stat. 169, 259, and under Section 211 of the National Industrial Recovery Act of 1933, 48 Stat. 195, 208.

Petitioner was engaged in producing and manufacturing gasoline and lubricating oil and selling the same at both wholesale and retail during all of the time involved by the issues in this case (R. 5, 29).

Conoco Oil Company (herein called "Conoco") was a Delaware corporation, organized in August, 1929, for the purpose of marketing petroleum products in the Great Lakes Region, and it was engaged in that business continuously from the date of its organization until sometime in 1935. It was not a producer or manufacturer. Its capital stock was wholly owned by petitioner (R. 68, 73-4).

It had offices in Chicago from which its business in those states was transacted, and it had about fifty employees therein (R. 120-1). From its organization it owned real and personal property in each of the states in which it did business, which stood in its name. It owned service stations, trucks, and other equipment, all bearing its name (R. 74-5). Its general policies were determined by its officers and directors in Ponca City (R. 119-20) but its marketing operations were conducted from its offices in Chicago (R. 121). It paid the salaries of its employees and the taxes on its properties from its Chicago offices (R. 121-2). Its accounts receivable ledgers, personnel records, bills payable ledgers, and merchandise ledgers were kept in its office in Chicago (R. 150-1). It sold to

jobbers, retailers, and consumers, and had storage at about seventy-five points where it received tank car shipments (R. 232). It had its own bank account in Chicago, which was maintained from funds derived from its sales. All operating expenses were paid from the banking funds, and when more funds were in bank than currently needed, remittances were sent to apply on the open account with petitioner for purchases of petroleum products (R. 238-9). Its manager at Chicago never took part in the purchase of any gasoline (R. 235). Its officers in Ponca City always made or arranged for its purchases (R. 233). Its business was, and for three years had been, the purchase and sale of oil and gasoline as a dealer, and it had previous to the purchases here involved, purchased practically all its requirements from petitioner.

The general offices of all of petitioner's subsidiaries, including Conoco, were in petitioner's office building in Ponca City, Oklahoma. Conoco's general books of account were kept there by the same employees who kept petitioner's books, and most of its chief officers who directed its affairs were also officers of petitioner and worked for both (R. 123; 133-4; 149-50; 158; 178; 261-2; 266); but Conoco always paid its proportion of the salaries of the employees and officers who did work for both, and its proportion of the administrative and overhead expenses, computed on the basis of the gallonage handled and marketed. Its board of directors met in Ponca City (R. 76; 109-10; 158).

Negotiations carried on between petitioner's officers and those of Conoco from June 6 to June 20, 1932, resulted on the latter date in petitioner's sale to Conoco of 18,407,760 gallons of gasoline then in various terminals of Great Lakes Pipe Line Company at the price of $1,243,303.90. On that day petitioner executed, acknowledged, and delivered to Conoco a bill of sale of the gasoline (R. 70-1; 105), describing it as in the possession of Great Lakes Pipe Line Company in its terminals in Chicago, Des Moines, Kansas City, Minneapolis, and Coralville, Iowa, stating the end points of the gasoline, the quantities sold of each end point in each terminal, and the sale price (Plf's. Ex. 5, R. 412). On the same day petitioner sent to Great Lakes, which is a common carrier, a teletype message describing the gasoline, and stating that petitioner had that day sold and delivered the gasoline to Conoco and that "further movement by you of this gasoline will be subject to orders from the said Conoco Oil Company" (R. 72; 415-6). Thereupon Conoco, by G. F. Smith, its vice-president, executed to petitioner a receipt for the gasoline (R. 105; 412) and Conoco was charged on petitioner's books with the purchase price, and the inventory account of the gasoline was transferred from petitioner's to Conoco's books (R. 108-9; 156-7; 206). The receipts from the sale of this gasoline were not "ear marked" for transmittal to petitioner, as sales by an agent would be, but the purchase price of the gasoline, as of previous purchases, was paid to petitioner by Conoco through its usual procedure, that is, by payments on the open account as funds were avail-

able after paying regular expenses (R. 208; 238). Conoco's requirements were from three to four million gallons of gasoline per month (R. 139-40), and it disposed of this entire inventory by the end of the year 1932 (R. 139).

Prior to the sale, the manner of handling Conoco's business had been this: Its general policies were determined by its officers in Ponca City, generally after a conference with petitioner's officers on the more important matters. Conoco's officers themselves, however, made its ultimate decisions, and its officers and managers handled its transactions (R. 116-17; 120). Quarterly in advance Conoco's manager in Chicago prepared an estimate of the company's needs, and transmitted the same to Ponca City, where it was approved or modified by Conoco's chief officers, who were also officers of petitioner but were then acting for Conoco (R. 116-17; 120; 235). Upon the approval of the estimate petitioner would direct Great Lakes to accept Conoco's orders for gasoline and fill the same out of petitioner's stocks in Great Lakes' Terminals (R. 124; 128-9). Thereupon Conoco would place its orders for gasoline directly with Great Lakes, sending copies thereof to its general office at Ponca City. Great Lakes would fill the orders and deplete petitioner's inventory by the amount thereof, and petitioner would charge the gasoline to Conoco. E. S. Karstedt was petitioner's vice-president in charge of sales, and was also vice-president of Conoco (R. 180-3; 256-62; 233-4). Both petitioner's and Conoco's sales departments were subject to his general supervision. The marketing departments of petitioner and of Conoco

were under him, and L. T. Cramer was manager of the sales division thereof (R. 178-181; 260-2).

In each company there was a division of the marketing department known as the "order and distribution division" (R. 133-4; 180-3; 189; 196). It kept the records of such company's available oil and gasoline in the refineries and various storage points, the grades thereof, and the amount and location of all gasoline owned by each. All orders received by either company for gasoline, after being accepted by its marketing department, were then turned to its order and distribution division. It was the latter's duty to determine the source of supply from which the order could be filled most economically, and to place the order with that source of supply. The same personnel served each company as an "order and distribution division," their salaries being allocated to each company.

As a division of petitioner, it saw that all of petitioner's stations and marketing outlets were properly supplied. If petitioner had stocks in its own refineries or storage, its order would be placed against those stocks. If petitioner had no stock at a point from which its order could be economically filled, this division would buy the gasoline from some one else at such point. It functioned in a similar manner as a division of Conoco's marketing department. That Division had always so functioned both for petitioner and for Conoco (R. 123-4).

When petitioner made the sale to Conoco on June 20, 1932, both petitioner's and Conoco's books reflected the sale

and Conoco's ownership of the gasoline (R. 108; 156-7; 205-6), and thereafter Conoco, through its officers and its order and distribution division, controlled that gasoline (R. 120; 133-5; 159). Also the records of the petitioner's order and distribution division showed Conoco's ownership of that gasoline. Thereafter, as Conoco drew upon that stock in Great Lakes' terminals, no charge therefor was made against it on petitioner's books, because Conoco was drawing upon its own stock (R. 157); but a record of the withdrawals was kept both by petitioner and by Conoco. Conoco continued to place its orders for gasoline with Great Lakes, the only difference being that it was ordering the delivery of its own gasoline instead of gasoline belonging to petitioner. Sales by Conoco of gasoline which it purchased from petitioner on June 20, 1932 and June 14, 1933 were not entered on petitioner's books (R. 157).

After the sales to Conoco the order and distribution division of each company continued to function as before. There were occasional instances where that division, acting for Conoco, sold a part of the latter's gasoline to petitioner. If petitioner needed gasoline to supply a customer at a place near which Conoco had gasoline and petitioner did not, the latter bought the gasoline from Conoco and paid or credited it with the purchase price. Altogether, out of the 26,715,360 gallons of gasoline sold to Conoco, on the two dates involved, petitioner and another subsidiary of petitioner bought back 704,000 gallons (R. 140-1). In all instances these sales by Conoco were made by its order

and distribution division, functioning under the direction and authority of Conoco's chief officers in Ponca City.

Although petitioner notified Great Lakes on June 20, 1932, that it had sold the gasoline to Conoco, and that further movement thereof would be subject to Conoco's orders, Great Lakes did not change its books in respect to the ownership of the gasoline (R. 129-30). Its books showed all gasoline received from petitioner as belonging to petitioner regardless of whom it was sold to (R. 145). It considered it unnecessary that it keep such records, and was unwilling to be burdened with that extra detail (R. 129-30). Also, while Great Lakes kept depletion records of petitioner's stocks, it did not keep a separate depletion record of the gasoline in its terminals that was sold to Conoco, except that the depletion could be worked out through the orders that Great Lakes filled from those inventories; but a depletion record of those stocks was kept in the general offices of the respective companies in Ponca City.

Petitioner paid the taxes upon its subsequent sale of all gasoline which it bought back from Conoco (R. 141). Conoco, after buying the gasoline from petitioner, sold the same in competition with other dealers at the same general market price which other dealers in the same localities received for gasoline of the same grade (R. 270-1; 184-5).

The sale by petitioner to Conoco of the 8,307,600 gallons of gasoline on June 14, 1933, before the effective date of

the act increasing the tax from 1 to 1½ cents a gallon, was evidenced by a bill of sale bearing that date (R. 416-17) and similar to that of June 20, 1932. A receipt for that gasoline was executed by Conoco, and the circumstances leading up to the execution of the bill of sale were substantially the same as those leading up to the execution of the bill of sale of June 20, 1932 (R. 138). The tax of 1 cent a gallon was paid to petitioner by Conoco on that sale, and remitted to the Government.

Dealers in gasoline who were selling in competition with Conoco during the 15-day period prior to June 21, 1932, increased their purchases of gasoline from two to four times as much as they had theretofore purchased in a comparable period (Plf's. Ex. 12-22, R. 419-429) and "in order for Conoco to compete with them on an equal cost basis it was necessary for it likewise to purchase prior to June 21, 1932, stocks of gasoline largely in excess of its current demands. A like situation existed when the sale was made to Conoco in 1933" (R. 714).

The Commissioner refunded the tax on sales to Conoco of its "normal requirements," but held that sales to Conoco on June 20, 1932, and June 14, 1933, being in excess of Conoco's "normal requirements," were not effective to prevent the assessment of the tax against this petitioner upon the subsequent sale by Conoco of such gasoline, because the sales had been made by petitioner to avoid an imminent tax liability (R. 27; 16-17).

Upon the claim for refund being denied, petitioner filed

this action, within the time allowed, for recovery of the tax paid, plus interest. A waiver of jury was entered and the case tried to the Court. The opinion of the trial court was filed (R. 294-313) and judgment rendered against the petitioner. Appeal was had to the Circuit Court of Appeals for the Tenth Circuit, and the judgment of the trial court was affirmed on June 26, 1940.

This cause also involved excise taxes on gasoline and lubricating oil sold by petitioner to Continental Oil Company of Nevada at or about the same time as the sales to Conoco. As to those taxes petitioner acquiesces in the judgment below and the decision of the Circuit Court of Appeals; and by this proceeding it is sought only to have this Court review the judgment as to the taxes involved and arising in connection with the transactions and sales by petitioner to the Conoco Company, which taxes are approximately one-third of the amount sued for and hereinbefore stated.

JURISDICTION

The jurisdiction of this Court is invoked under Paragraph 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code Tit. 28, Paragraph 347).

The decree of the Circuit Court of Appeals was entered on June 26, 1940.

QUESTIONS PRESENTED

Did the transactions between petitioner and Conoco Oil Company, on June 20, 1932, and on June 14, 1933, respectively, constitute valid sales of the gasoline involved, divesting petitioner of the ownership of such gasoline, or was petitioner the owner thereof on June 21, 1932, and June 17, 1933, and taxable on sales of such gasoline made subsequent to those dates?

Incident to the determination of this, there are presented as errors the reasons relied on for allowance of the writ.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals has decided this question in a way apparently in conflict with applicable decisions of this Court holding that an excise taxing statute must be strictly and formalistically construed, and that separate corporate entities must be regarded for tax purposes.

Founders General Corporation v. *Hoey*, 300 U. S. 268.

Raybestos-Manhattan, Inc., v. *United States*, 296 U. S. 60.

Hatch v. *Reardon*, 204 U. S. 152, 159.

2. If such decisions be held not applicable, then the Circuit Court of Appeals has decided, in a manner contrary to the intent of Congress as expressed in the statutes here involved, and contrary to the settled practice of the Treasury Department, an important question of federal law which has not been, but should be, settled by this Court, to-wit:

Under the manufacturer's excise tax act are a corporation and its wholly owned subsidiary to be considered as a single economic unit and sales between them refused recognition, and thus be nontaxable, or are they to be considered as separate entities capable of passing title from one to the other? If a transaction between a parent corporation and its subsidiary after the effective date of the act would be treated as a valid sale and therefore taxable, will the same transaction made before the effective date of the act be denied recognition as a valid sale?

Sec. 619(b), Rev. Act of 1932.

Int. Rev. Cum. Bul. XI-2, pp. 513, 514.

Art. 15 of Regulation 46, Rev. Act of 1932.

Pickwick Corp. v. *Welch*, D. C. Cal., 21 Fed. Sup. 664, 670.

3. The decision of the Circuit Court of Appeals is apparently in conflict with applicable decisions of this Court holding that a taxpayer has the right by lawful means to avoid an imminent tax liability.

Superior Oil Co. v. *Mississippi*, 280 U. S. 390.

Gregory v. *Helvering*, 293 U. S. 468.

4. The Circuit Court of Appeals has sanctioned a departure by the trial court from the accepted course of judicial proceedings resulting in depriving petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Saunders v. *Shaw*, 244 U. S. 317.

Ga. Ry. & Elec. Co. v. *Decatur*, 295 U. S. 165, 171.

5. Petitioner did not include the tax in the price of the gasoline sold subsequent to June 20, 1932, or June 17, 1933, nor collect the amount of the tax from the vendee in such sales.

Sec. 621(d), Title 12, Revenue Act of 1932.

CONCLUSION

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled on its docket, No. 1938, *Continental Oil Company, Appellant*, v. *H. C. Jones, Collector of Internal Revenue, Appellee*, to the end that this cause may be reviewed and determined by this Court as provided for by

the statutes of the United States; and that the judgment herein of said Court be reversed by the Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

CONTINENTAL OIL COMPANY,
Petitioner,

By D. A. RICHARDSON,

A. L. HULL,
Its Attorneys.

Dated August 27, 1940.



BRIEF IN SUPPORT OF PETITION

A statement of the grounds on which the jurisdiction of this Court is invoked, and a statement of the case, are contained, respectively, at pages 10-11 and pages 1-10 of this Petition and Brief, and are incorporated herein by reference.

STATUTES INVOLVED

Sec. 601(c)(1), Rev. Act of 1932, 47 Stat. 169, 259:

"(c) There is hereby imposed upon the following articles sold in the United States by the manufacturer or producer, or imported into the United States, a tax at the rates hereinafter set forth, to be paid by the manufacturer, producer, or importer:

"(1) Lubricating oils, 4 cents a gallon; but the tax on the articles described in this paragraph shall not apply with respect to the importation of such articles."

Sec. 617:

"(e) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

"(b) If a producer or importer uses (otherwise than in the production of gasoline) gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this title be considered a sale.

"(c) As used in this section—

"(1) the term 'producer' includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer.

"(2) the term 'gasoline' means gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes."

Sec. 211(a), Act of June 16, 1933, 48 Stat. 195, 208:

"(a) Effective as of the day following the date of the enactment of this Act, section 617(a) of the Revenue Act of 1932 is amended by striking out '1 cent' and inserting in lieu thereof '1½ cents.'"

OPINIONS BELOW

The opinion of the Circuit Court of Appeals by BRATTON, C. J., appears at pages 700-716 of the Record. It has not yet been printed in the reports. The opinion of the trial court is reported in 26 Fed. Supp. 694, and appears at pages 294-313 of the Record.

ARGUMENT

1.

Statutes levying excise taxes are not remedial laws, nor founded on any permanent public policy. Imposing burdens upon the public and restricting the pursuit of occupations and the enjoyment of property, to sustain a tax a given case must come clearly within the letter of the

statute. The tax imposed by the statutes involved herein is not a common burden upon all property, nor upon all the people. It is not a general, but a special tax, reaching only to special cases, and affecting only a special class of persons. That special class of taxpayers have the right to be technically brought within the law before being subjected to its special burdens. This Court has so construed certain excise taxes.

In *Founders General Corporation* v. *Hoey*, 300 U. S. 268, certificates of corporate shares subscribed for by A, were by his direction and for his convenience, issued to B as his agent. Stamp taxes were held payable upon the original issuance, and also upon the subsequent transfer of the certificates from the agent to his principal, although the agent had no beneficial interest in the certificates whatever. See also *Raybestos-Manhattan, Inc.*, v. *United States*, 296 U. S. 60. "There must be a fixed and indisputable mode of ascertaining a stamp tax." *Founders General Corp.* v. *Hoey, supra; Hatch* v. *Reardon*, 204 U. S. 152, 159.

The decision of the Circuit Court of Appeals is grounded on decisions construing income tax statutes; therefore, is apparently in conflict with these decisions of this Court.

2.

If these decisions under a stamp excise tax are not applicable, then Congress has clearly indicated that intercompany transactions are taxable under manufacturers excise tax statutes, and the Treasury Department has estab-

lished a settled practice in conformity with that intention of Congress.

The Circuit Court of Appeals has decided this question in a manner contrary to the intent of Congress, and to the settled practice of the Treasury Department.

Sec. 619(b), Revenue Act of 1932.

Cum. Bul. XI-2, pp. 513-14.

Regulation 46, Art. 15, Revenue Act of 1932. (See Appendix.)

The construction placed by the Department of Justice upon a comparable transaction occurring after the effective date of a comparable excise act is disclosed in the district court case of *Pickwick Corporation* v. *Welch*, reported in 21 Fed. Supp. 664, 670. In that case the Department urged, and the trial court held:

> "The Congress, by legislation, and the Commissioner of Internal Revenue, by regulation, has recognized the fact that income taxes should be based upon the general principle of levying the tax according to the true net income of a single enterprise, even though the business is operated through more than one corporation. * * *
>
> "A careful examination of the sections of the Revenue Acts of 1924 and 1926, which have been hereinbefore quoted, seems to indicate clearly that the Congress intended an excise tax to be paid upon the sale or leasing of a taxable article to an affiliate. Sections 600 and 601(a). We cannot see how, except by a sale, the ownership of these bus bodies was transferred from parent to subsidiary. Each transaction was at a profit to the Corporation. Each transfer was absolute, title passed and the charge against the Sys-

tem in the Corporation's books was such as would ordinarily obtain between persons dealing at arm's length. Section 240(c) of these Revenue Acts (quoted *supra*) leaves no doubt as to the existence of an affiliation between the Corporation and the System.

"On the one hand, in dealing with excise taxes, Congress has said in section 601(a) of these Revenue Acts that the excise tax which the Court is now considering shall be imposed upon intercompany transactions in bus bodies; and on the other hand, in dealing with income taxes, Congress has said in section 240 of the Revenue Act of 1926 that intercompany transactions shall be eliminated in computing the consolidated net income of affiliated corporations which elect to file consolidated returns for income tax purposes. In other words, the statutory treatment of intercompany transactions seems to be exactly opposite in the determination of the excise tax of affiliated corporations from that used in computing the consolidated income tax of affiliated corporations. It will be noted that in the case of income taxes the taxpayer is given an election; in the case of excise taxes there is no choice if the taxpayer permits himself to come within the act."

Petitioner believes a determination of this question by this Court is important, and of general public interest.

3.

In the opinion the Circuit Court of Appeals says a taxpayer has the right to avoid *in toto* that which otherwise would be his tax liability, provided the method employed to accomplish that end is permitted by law; also, that the separate entities of a corporation and its single

stockholder generally are preserved in matters relating to taxes.

It states the principle that where stock ownership is employed for the purpose of dominating and controlling a subsidiary, the subsidiary becomes an instrumentality of the parent; and, where to recognize the separate corporate entity would work a fraud or injustice, the two corporations are treated as merged.

Any tax question aside, was the transaction of June 20, 1932, a sale to Conoco? Did ownership of the gasoline pass to it on that date?

Generally, the essential elements of a sale are: (1) competent parties; (2) a thing sold; (3) a price, or consideration; and (4) mutual agreement of the parties.

Petitioner and Conoco were duly organized corporations, engaged in producing and/or marketing gasoline. Sales and purchases of gasoline had occurred between them for three years prior to June, 1932.

On June 6, 1932, the Revenue Act of 1932 was passed, making the sections here involved effective June 21, 1932. Those sections only taxed sales of gasoline by a producer; jobber sales were tax free. Congress failed to amend the Act by making jobber sales taxable, even though the Treasury Department advised that a refusal to remove the "serious discriminations" in the Act would result in a transfer of large stocks by producing companies to affiliated sales companies, and they "can do this through their affiliates in the usual course of business" (R. 346). It was

always recognized each was competent to contract with the other.

Petitioner on June 20, 1932, had finished gasoline in the terminals of a common carrier. Nothing had to be done to put that gasoline in a marketable condition. That gasoline was the "thing sold."

Conoco agreed to pay the purchase price. Article 5 of Regulation 44 under the Revenue Act of 1932 said, in part, in the determination of when title passed:

> "In the case of a sale on credit, it is immaterial whether or not the purchase price is actually collected"

recognizing the rule

> "It is the agreement to pay, rather than the actual payment of the price, which is the essential element of a sale."
>
> 23 R. C. L., p. 1277.

There was mutual agreement of the parties evidenced by the execution and delivery of the bill of sale by petitioner, and the acceptance of delivery of the gasoline by Conoco. This being a fungible commodity, the execution of the bill of sale was a delivery thereof, and sufficient evidence of the passing of title thereto. *Waldock* v. *Frisco Lbr. Co.*, 71 Okla. 200, 176 Pac. 218. The Commissioner recognized the existence of all these necessary elements of a valid sale in the transactions between these parties to the extent of Conoco's "normal requirements," but this Court will readily observe that requirements to enable Conoco to compete with other jobbers in its marketing

area on an equal cost basis after June 21, 1932, and June 17, 1933, can only be measured by the abnormally increased inventories of its competitors, and not by its usual requirements before the enactment of the statutes here involved.

That the parties intended the title to pass to Conoco on June 20, 1932, can hardly be denied. That was the very essence of the corporate purpose motivating the purchase and sales. Immediately upon completion of the transaction the carrier who had the custody of the gasoline sold to Conoco, was notified of the sale and that further movement of that gasoline would be subject to Conoco's orders. Certainly it would have required a comparable series of transactions to have put title back in petitioner on June 21, 1932, and June 17, 1933.

Had there been no intention on the part of petitioner and Conoco to divest petitioner of the ownership of the gasoline on the 20th day of June, 1932, the actions of the petitioner and of Conoco after that date were wrongful and fraudulent, because by the nonpayment of the tax on subsequent sales the petitioner represented to the Government that it had completely divested itself of ownership of the gasoline prior to the effective date of the act, and if it had not intended that such ownership should pass on the 20th day of June, 1932, it knowingly evaded a tax liability through fraudulent representations as to the sale to Conoco. The same is true as to the sale on June 14, 1933. But such representations are negatived by the finding of the trial court and the Circuit Court of Appeals

hat the transactions were not fraudulent, nor were they therwise illegal.

The Circuit Court of Appeals having found specifically hat the transfers in question were not tainted with fraud, ior were they otherwise illegal, it must have found that he method employed to avoid the forthcoming tax was a nethod permitted by law. Because of the same finding of act, the Circuit Court of Appeals has negatived the ap-lication of the so-called instrumentality doctrine, because hat doctrine is only brought into operation where the ubsidiary has been used as an instrumentality to perpe-rate a fraud or a wrong against a complainant. *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307, 322. The nly complainant here is the United States, and its only omplaint is the avoidance of the tax. But the Circuit Court of Appeals said that purpose is not wrongful nor llegal. That Court quotes from *Higgins* v. *Smith*, 308 J. S. 473, as follows:

> "The government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham, may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute."

But again, that Court found that the "event" was iot unreal or a sham, because had it been either, the trans-fer and the subsequent actions based upon the transfer would have been fraudulent and entirely illegal, and that

Court has made the specific finding that they were not tainted with fraud nor otherwise illegal.

The cited case was a case involving income taxes, and applying congressional intent in respect of income taxes, this Court said:

> "It is command of income and its benefits which marks the real owner of property."

In other words, Smith and his wholly-owned corporation were treated as a single economic unit for the determination of gains or losses with respect to the income tax. But Congress has legislated in respect of excise taxes upon an entirely different basis.

The Circuit Court of Appeals then says:

> "The transfers in question here were not tainted with fraud, and they were not otherwise illegal. But it is clear beyond doubt that the generating motive for the making of them was tax consequences. That is so plain that elaboration is unnecessary. The facts and circumstances preceding, attending and following the transactions lead to the conclusion that in respect of liability for excise tax, the subsequent sales of the gasoline and oil were the equivalent of sales by Continental in its own right. *Griffiths* v. *Commissioner, supra; Higgins* v. *Smith, supra.*"

The Court's attention is called to the fact that the reason for the purchase by Conoco had no relation to an avoidance of tax liability, but was solely to enable Conoco to compete with its competitive jobbers on an equal cost basis. The purpose of the sale to Conoco was to protect the petitioner, which was also a retail dealer, against the dis-

crimination created by the act in favor of its competitive dealers whose sales after June 20, 1932, and June 17, 1933, were tax free as distinguished from sales by it which were taxable under the act. That was the real business purpose of the sales. Any wrong to the complainant being absent—and the Circuit Court of Appeals found no wrong was done because what was done was legal and free from fraud—and a real corporate purpose being present, it is evident the conclusion of the Circuit Court of Appeals is based solely upon the "generating motive" for the sales being tax avoidance. Therefore, the decision is in conflict with the principles declared in *Superior Oil Co.* v. *Mississippi*, and *Gregory* v. *Helvering*, *supra*, that a taxpayer may avoid an imminent tax liability by lawful means.

4.

The trial court made the following finding of fact:

"No. XXXI.

"The stock of gasoline held in Great Lakes after the transfers of June, 1932, was mixed or blended by Great Lakes on Continental's order, in accordance with the specifications of the marketing committee of the proprietary companies, among whom was neither Conoco nor Nevada. Thus, 400 end point and 420 end point gasoline were blended by Great Lakes on Continental's order, resulting in a new grade of gasoline, solely on Continental's order, even though the gasoline on Continental's books belonged to the other companies. This blending and mixing was ordered by Continental on its own order, without authority either from Conoco or Nevada, who were not connected with the transaction and who received no profit from it" (R. 322).

When evidence was first offered on the subject of blending by the respondent, objections were made and the trial court stated that the evidence would not be considered on the subject of blending unless the decision of the Court on the main question should be for petitioner (R. 228-253). The Court also advised petitioner that no testimony need be offered as to blending, nor need the question be briefed (R. 271).

Notwithstanding the statements, the Court made finding of fact XXXI, which was a finding upon an issue of fact which had been expressly reserved, and upon which the Court had not received either evidence or argument in petitioner's behalf.

The Circuit Court of Appeals, after referring to Section 617(c)(1), which makes a blender a producer under the act, says:

> "The entire record negates any foundation upon which it could be concluded that the court rested its decision and judgment upon the theory that the mixing constituted blending which rendered Continental liable for the tax."

Petitioner never contended the trial court held it liable because blending made it a producer under the act. It was always a producer whose sales were taxable on and after June 21, 1932, and June 17, 1933.

Petitioner did contend that in determining whether it exercised control over the gasoline sold to Conoco, after the sale, a finding by the trial court that petitioner, without Conoco's authority and for its sole benefit, took Con-

oco's gasoline and by blending made a new grade of gasoline, was a finding of fact the probative force of which on the mind of the trial court in reaching its conclusion as to control cannot be measured by an Appellate Court. It was a finding of fact upon an issue reserved and as to which the trial court, by its ruling, received no testimony or argument on behalf of petitioner.

That this finding largely influenced that Court in its determination of the case is evidenced by the statement in the opinion of the trial court in which the Court says:

> "The Court agrees with every contention of the plaintiff except on the question of control and the right to recover under the theory of unjust enrichment" (R. 312).

The force of such a finding in the determination of control is further evidenced by the statement of counsel for the respondent when this proof was offered to the effect that the reason the respondent felt so strongly about the matter of blending from the angle of control as well as blending was:

> "* * * That the handling of the products, which we say and allege are done by the parent company seems to us to be a very strong indication of the control of the products by that company" (R. 251-2).

In addition to that statement to the Court, the respondent submitted as one of his requests for special findings Request #29. This is verbatim the finding adopted and made by the Court as its finding of fact No. XXXI (R. 288).

The petitioner contends that the making of that finding, under the circumstances shown, constituted a denial of a hearing to petitioner upon an issue which the trial court considered material, and that the judgment rendered thereon and because thereof constitutes a departure from the accepted course of judicial proceedings, resulting in depriving petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. It is a clear violation of the requirement of law that a party shall be given an opportunity to be heard upon every material issue before judgment shall be rendered against him.

The Circuit Court of Appeals in its refusal to disapprove such procedure intimates that to remand the case would be an empty form—a concession to technicality. The same intimation was made in *Saunders* v. *Shaw*, 244 U. S. 317, but this Court, speaking through Justice HOLMES, said:

> "It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendants' rights are protected without giving him a chance to put his evidence in."

Except for the 704,000 gallons resold to petitioner and another subsidiary by Conoco (which the trial court, during the trial, stated was an ordinary and usual procedure in the business world) (R. 163), and the use by Conoco of certain order forms of Continental in ordering out shipments of gasoline (which the trial court found, during the

trial, did not mean such orders were made by Continental) (R. 204), the Exhibits #81 to #243, in substance, constituted the entire proof of control offered by the Government, and in the absence of a finding that there was a blending resulting in the creation of a different grade of gasoline from that which the warehouseman was obligated to deliver to Conoco on demand (R. 148), there would have been no substantial evidence upon which the trial court could have based a finding of control.

The determination of this case depended largely on the facts found by the trial court, if supported by evidence, which made it even more necessary that petitioner be afforded a hearing on every issue of fact considered by the trial court.

5.

Section 621(d), Title IV of the Revenue Act of 1932, is as follows:

> "No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund."

There is no justification in the record for the applica-

tion of the doctrine of unjust enrichment. All that petitioner ever received from its sale of the gasoline to Conoco was the purchase price agreed upon, and all proceeds accruing from its subsequent sale by Conoco went into Conoco's own banking account, were used by Conoco in its own operations and after satisfaction of its own current liabilities, any surplus which it could safely spare was paid to petitioner to apply on the open running account for products supplied over the three-year period of Conoco's operations including these two purchases.

It is not disputed that the selling price was set by the market leader in Conoco's territory, and that the price at which Conoco sold was fixed by its own officers and not by petitioner. That price never included the tax except as to a few contract customers, in which cases the tax collected by Conoco was, by Conoco, remitted to the Government (R. 194).

Petitioner fully sustained the burden imposed by section 621(d), *supra*. It did not make the subsequent sales of this gasoline; it did not fix the price at which it was sold; and it received nothing in respect of such sales beyond payments on the purchase price of goods sold Conoco.

CONCLUSION

A writ of certiorari should be granted as prayed in the petition.

Respectfully submitted,

CONTINENTAL OIL COMPANY,

By D. A. RICHARDSON,

A. L. HULL,

Its Attorneys.

Sec. 619(b) of the Revenue Act of 1932, in part, reads as follows:

"(b) If an article is—

"(3) sold (otherwise than through an arm's-length transaction) at less than the fair market price; the tax under this title shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner."

Art. 15 of Regulations 46 provides:

"Where through the existence of special arrangements between a manufacturer and a purchaser (as in the case of intercompany transfers at cost or at a fictitious price), the price for which articles are sold by the manufacturer does not reflect a fair market price, the sale is regarded as one made 'otherwise than through an arm's-length transaction.' In such cases the tax shall be computed upon a fair market price which, under the Act, the Commissioner is empowered to determine.

"Congress apparently foresaw the probability of the creation of corporations having identical interests, one as the manufacturer and the other as the distributing agency, and sought to impose the tax on the full manufacturer's sales price where the manufacturing corporation sold to the distributing corporation at a nominal price. There are numerous other instances where similar mutual interests could operate to the disadvantage of the Government. Viewing the statute in this light, it must be presumed that Congress did not intend to have two or more affiliated corporations

recognized as a single entity for manufacturers' excise tax purposes. If it had so intended it seems reasonable to believe that some provision would have been made in the statute for such recognition. That no provision was made, coupled with the fact that transactions not at arm's-length are specifically provided for, leads to the conclusion that the intent was to impose a tax on all sales between such corporations.

"That Congress had full knowledge of the conditions existing with reference to affiliated corporate groups is further established by the fact that in the income tax law special provisions appear relating to such groups, under which they are authorized to file consolidated returns. The general laws recognize corporations as separate entities; and in the absence of special legislation, such as is incorporated in the income tax provisions of the Act relating to affiliated groups, each corporation, as a separate legal entity, must file a separate return for the purpose of the excise tax.

"The contention that the statute should be interpreted to mean the 'economic manufacturer,' rather than the legal entity, can not be supported either by the language of this particular statute or by the general law relating to corporations. In the absence of specific provisions to the contrary, wherever a statute has spoken of a corporation it has always been interpreted to mean a single legal entity."

Income Tax Bulletins, Vol. VII, Cumulative Bulletin XI-2, p. 513-4.

REPLY BRIEF

FILED
OCT 12 1940
CHARLES ELMORE CROPLEY
CLERK

NO. 386

In the Supreme Court of the United States

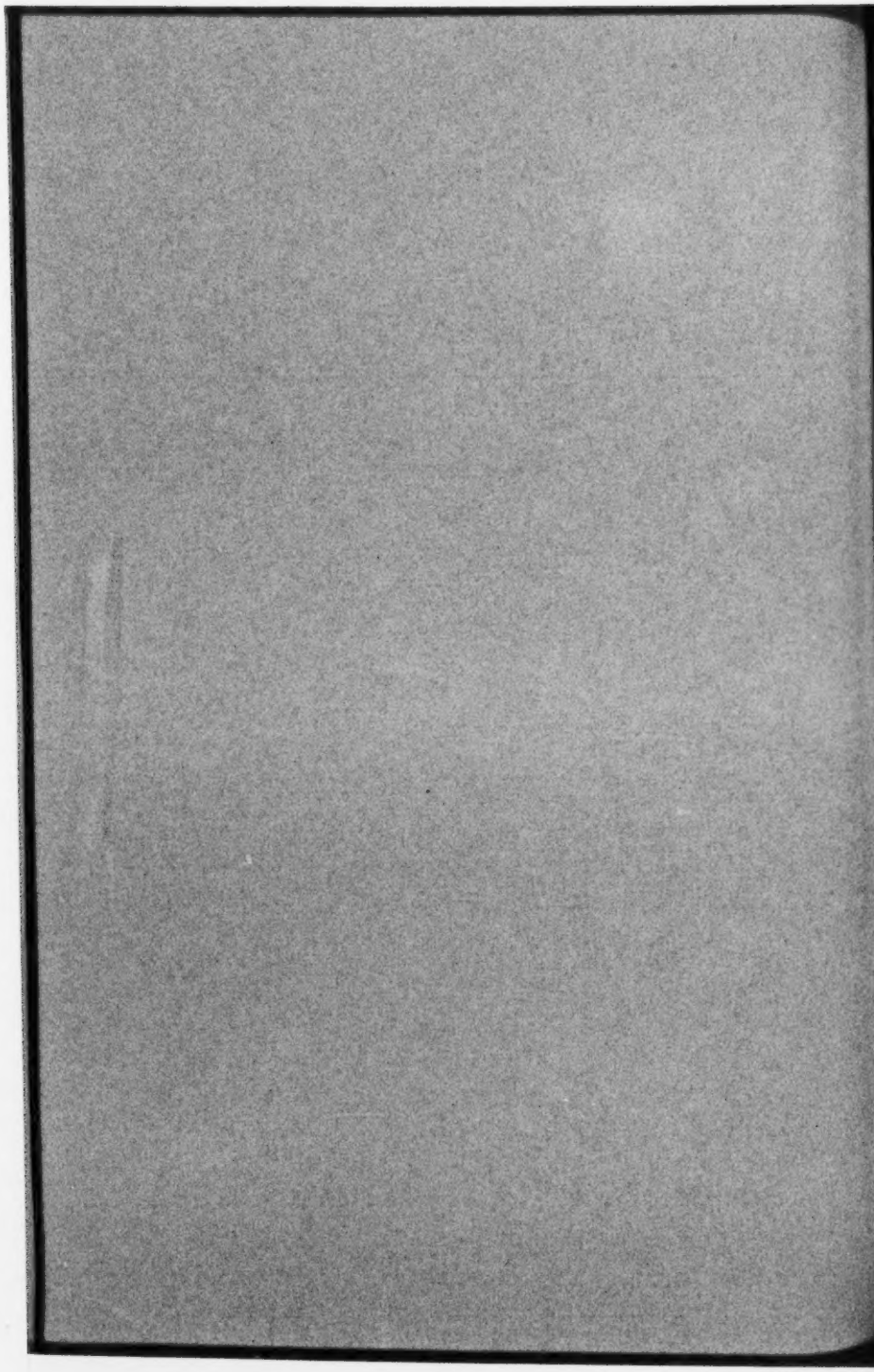
OCTOBER TERM, 1940

CONTINENTAL OIL COMPANY, a Corporation,
Petitioner,
VERSUS
H. C. JONES, Collector of Internal Revenue,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

CONTINENTAL OIL COMPANY,
By D. A. RICHARDSON,
A. L. HULL,
Its Attorneys.



NO. 386

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CONTINENTAL OIL COMPANY, a Corporation,
Petitioner,

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

---

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

In respondent's statement certain facts are said to be disclosed by the findings of the district court. Among others:

> "The taxes in controversy were collected upon the subsequent sale by the subsidiaries just as though Continental had made the sales directly without the interposition of the subsidiaries." (Br. p. 3.)

Petitioner submits no such finding was made (R. 314-325). The undisputed proof is to the contrary (R. 185).

Again, respondent says:

> "There was no discussion concerning the prices to be paid for the inventories" (R. 318). (Br. p. 6.)

The wording of the finding made is "no argument," and not "discussion." The evidence is not controverted that the negotiations between the officials of the interested companies embraced discussions as to the "terms and conditions of the bills of sale," but there was no "argument as to what price the product should be sold for" (R. 79). The price is disclosed in the bills of sale (R. 411, 416), and there is no proof that such was not a fair price to both seller and purchaser.

Respondent says:

> "Notwithstanding the unusual character of the transaction * * *." (Br. p. 5).

The finding of fact was:

> "and so far as Conoco was concerned, they (the transfers) were distinctly unusual in the large amount of the transfer" (R. 319).

Petitioner concedes the amount purchased by Conoco on June 20, 1939, was in excess of its usual purchases. The same is true of purchases made during the same period by other jobbers (R. 419-429). Had Conoco not purchased as it did, its purchases after June 21, 1932, at the increased price would have left it in a weakened competitive position with other jobbers who had built up their floor stocks before the increase. (See statement of Judge PHILLIPS at R. 715).

In the argument respondent says the transaction was "admittedly for tax avoidance purposes." The position of petitioner was set out in its opening statement (R. 48). The sales to Conoco "served a proper and legitimate busi-

ness purpose" (R. 715). There is nothing "peculiar" about the facts. (Br. p. 7).

The major ground urged in the petition is in effect concurred in by respondent, to-wit, that the Circuit Court of Appeals has decided in a manner contrary to the Congressional intent and the settled practice of the Treasury Department a question of public importance on which this Court has not spoken. This question involves the proper construction and application of a federal statute. Respondent says:

> "The issue is merely whether the peculiar facts in this case call for the application of the same principles which governed in *Higgins* v. *Smith*, 308 U. S. 473, and *Griffiths* v. *Commissioner*, 308 U. S. 355." (Br. p. 7.)

and, in substance, that the application of an excise tax to a transaction between a parent and subsidiary corporation is to be determined by the presence or absence of a change in the flow of economic benefits. (Br. p. 8.) In support of its contention, respondent cites only the Higgins case.

There is no denial of petitioner's contention that the rationale of the decision of the Circuit Court of Appeals is contrary to the expressed intent of Congress under the excise taxing statute and the construction of these sections of the Act announced by the Bureau shortly after its passage. (Petitioner's Brief, p. 12). Petitioner submits that the liability for and the imposition of an excise tax has not heretofore been determined by the "flow of economic benefits." It is determined by the thing done, and not by the economic benefit resulting to either party from the

doing. There is no claim by respondent that the question presented by the petition has ever been passed on by this Court. In the absence of such claim the presumption must be indulged that respondent agrees it is an important question which this Court should determine.

The writ of certiorari should be granted.

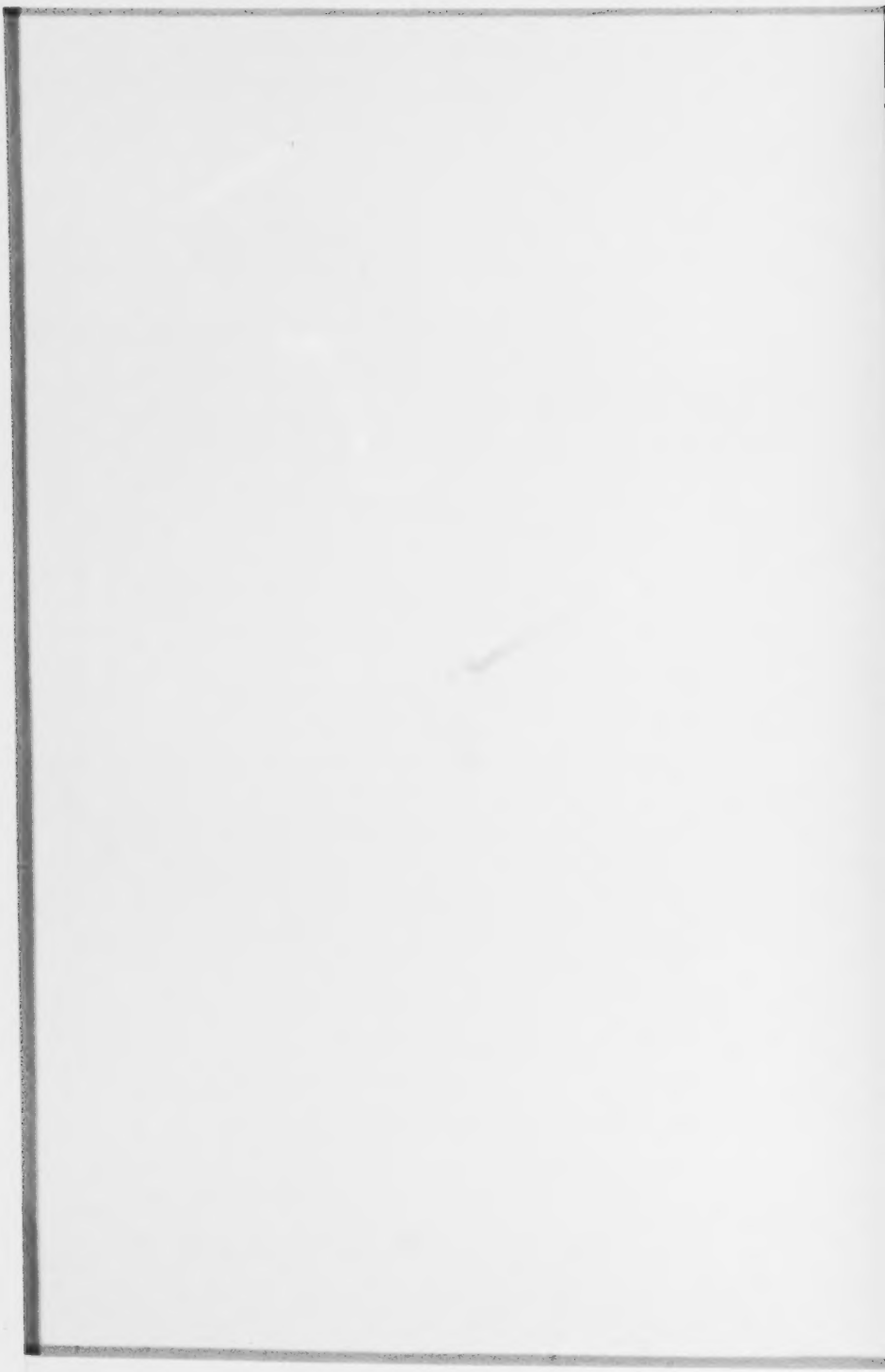
Respectfully submitted,

CONTINENTAL OIL COMPANY,

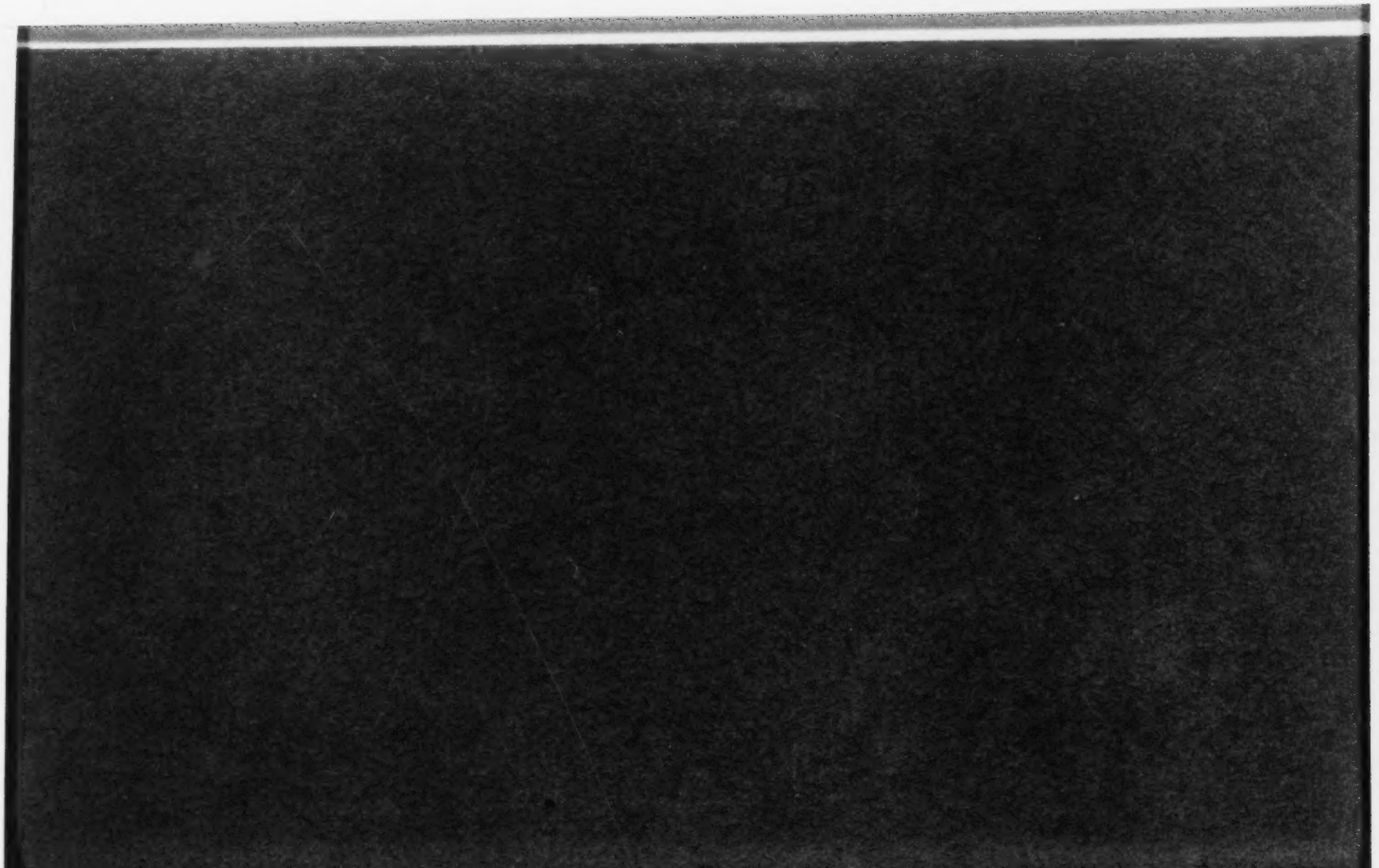
By D. A. RICHARDSON,

A. L. HULL,

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 386

CONTINENTAL OIL COMPANY, A CORPORATION,
PETITIONER

v.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 294–313) is reported in 26 F. Supp. 694. The opinion of the Circuit Court of Appeals (R. 700–716) is reported in 113 F. (2d) 557.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 26, 1940 (R. 716). The petition for a writ of certiorari was filed on August 30, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the purported transfers of gasoline by the petitioner to its wholly owned subsidiary were ineffective to avoid the federal excise taxes assessed against the petitioner upon the subsequent sales of that gasoline.

STATUTES INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 617. TAX ON GASOLINE.
>
> (a) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.
>
> (b) If a producer or importer uses (otherwise than in the production of gasoline) gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this title be considered a sale.
>
> (c) As used in this section—
>
> (1) the term "producer" includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer.
>
> * * * * *

National Industrial Recovery Act of 1933, c. 90, 48 Stat. 195:

> SEC. 211. (a) Effective as of the day following the date of the enactment of this

Act, section 617 (a) of the Revenue Act of 1932 is amended by striking out "1 cent" and inserting in lieu thereof "1½ cents".

* * * * *

STATEMENT

This suit was brought by petitioner, Continental Oil Company, a Delaware corporation, hereinafter referred to as Continental, against the Collector of Internal Revenue to recover excise taxes in the amount of $699,131.82, with interest. The contested taxes were levied under the Revenue Act of 1932, which imposed an excise upon lubricating oil and gasoline sold by the "producer" thereof.

The findings of the District Court (R. 315–325), disclose the following facts:

Continental is, and was at all times material here, engaged in the business of producing, refining, and marketing petroleum and petroleum products (R. 315, 316).

On June 20, 1932, fourteen days after the enactment of the Revenue Act of 1932 and one day prior to the effective date of the excise tax imposed by that Act upon sales by producers of gasoline and lubricating oil, Continental transferred almost all of its finished inventory of gasoline and oil to two of its wholly owned subsidiaries (R. 315–316, 318). Continental's motive in effecting the transfers was to escape payment of the excise tax (R. 324). The taxes in controversy were collected upon the subsequent sale by the subsidiaries just as though Continental had made the sales directly without the interposition of the subsidiaries.

One of the subsidiaries, Continental Oil Company of Nevada, was a small dummy corporation which had been organized to protect the Continental name (R. 317). The petition for certiorari, however, does not seek review with respect to the taxes imposed on the sales of oil and gasoline routed through that subsidiary (Pet. 10), and in the circumstances we will not undertake to recount the many facts revolving around its activities and functions.

The second subsidiary was Conoco Oil Company of Delaware, hereinafter referred to as Conoco. It received from its parent, 18,407,760 gallons of gasoline on June 20, 1932, in the transaction mentioned above [1] (R. 315).

Conoco was organized in 1929 because another corporation had already registered the name of Continental in Illinois, Kentucky and Indiana, which Continental had unsuccessfully attempted to purchase from that corporation (R. 316–317). Conoco was dissolved in 1935, after Continental finally succeeded in purchasing the right to use its name in Conoco's territory (R. 319). Upon dissolution, Conoco simply became a district office of

[1] On June 17, 1933, immediately prior to the effective date of the increase of tax of one-half cent per gallon on sales of gasoline by producers under the National Industrial Recovery Act, Continental similarly transferred about 8,000,000 gallons of gasoline to Conoco under circumstances stipulated to be similar to the circumstances of the June 20, 1932, transaction (R. 316).

Continental, and the change from Conoco to the district office involved no change in personnel or facilities (R. 319).

The gasoline here in question remained physically present where it had been prior to the transfer, namely, in the possession of Great Lakes Pipe Line Company, hereinafter referred to as Great Lakes, a common carrier in which Continental was a large stockholder. The records of Great Lakes were not changed but still showed Continental as the owner, although it had been notified of the transfer. It regarded the transfer simply as an inter-company matter, and its procedure in handling and shipping the gasoline after June 20, 1932, was the same as it had been before (R. 317, 318, 319, 320).

Continental and Conoco had practically the same officers and board of directors. The same officers performed almost identically the same services for both companies. The main offices of both were together at Ponca City, Oklahoma (R. 317). The general books of both were kept by Continental employees in the accounting department of Continental (R. 322).

Notwithstanding the unusual character of the transaction, there was no meeting of Conoco's directors for the purpose of authorizing the transfer to it on June 20; but there was a bill of sale executed, which was unprecedented. The alleged ne-

gotiations as to the transfer were between persons who were officers of both companies. There was no discussion concerning the prices to be paid for the inventories (R. 318). Continental retained and exercised complete control of the inventories transferred on its books to Conoco (R. 324). Indeed, over 700,000 gallons of the gasoline transferred to Conoco were reacquired by Continental for its own purposes (R. 321).

Conoco was not in any financial position to purchase the gasoline transferred to it by Continental (R. 322, 323).

Continental and/or Conoco received an increased price for the gasoline to the extent of the federal excise tax, which was the same gross price that was received by its competitors who had paid the tax (R. 324–325).

The District Court found as a fact that the transfers to Conoco were merely bookkeeping transactions (R. 320), and were not bona fide; and that for the purpose of the excise tax Continental continued to be the owner of the gasoline in controversy (R. 324). It therefore denied recovery of the taxes paid upon Conoco's ultimate sales of the gasoline, since it treated those sales as having been made by Continental within the meaning of Section 617 (a) of the Revenue Act of 1932. The Circuit Court of Appeals affirmed.

ARGUMENT

The decision below is not in conflict with the decisions of any other circuit court of appeals [2] or with any decision of this Court. The issue is merely whether the peculiar facts in this case call for the application of the same principles which governed in *Higgins* v. *Smith,* 308 U. S. 473, and *Griffiths* v. *Commissioner,* 308 U. S. 355. Cf. *Taylor* v. *Standard Gas Co.,* 306 U. S. 307. The decision of the court below that those principles apply here was plainly correct and, in any event, presents no question for further review.

As pointed out by the court below (R. 708), the facts and circumstances show more than mere ownership of the stock of Conoco by Continental. They show domination, control, and participation in affairs of such kind and to such a degree as to prove conclusively that Conoco was no more than a subservient agency, utilized by the petitioner in a transaction which was admittedly for tax avoidance purposes. The purported transfer of the

[2] Indeed, the decision below is in line with the decisions in other circuits. Cf., e. g., *Campana Corp.* v. *Harrison* (C. C. A. 7th), decided August 14, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, par. 9642; *Albrecht & Son* v. *Landy* (C. C. A. 8th), decided August 19, 1940, not yet officially reported, but may be found in 1940 C. C. H., Vol. 4, par. 9649; *Mehrlust* v. *Higgins,* 112 F. (2d) 717 (C. C. A. 2d), pending on petition for a writ of certiorari, No. 316, October Term, 1940.

gasoline to such agency on the day before the excise tax became effective did not vary the control or change the flow of economic benefits. In such circumstances, the transaction must be dismissed from consideration for purposes of fixing the tax liability. *Higgins* v. *Smith, supra,* p. 476. The court below correctly concluded (R. 710–711) that in respect of liability for excise tax, the subsequent sales of the gasoline through Conoco were the legal equivalent of sales by the petitioner in its own right.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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SAMUEL O. CLARK, JR.,
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SEPTEMBER 1940.

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